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Nos. 12 and 73

In the Supreme Court of the United States

OCTOBER TERM, 1944

SKIDMORE ET AL., PETITIONERS

v.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARMOUR AND COMPANY, PETITIONER

v.

WANTOCK AND SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	3
Statute involved	3
Statement	3
Argument:	
I. The time spent by employees on duty as auxiliary firemen, except for the regular eating and sleeping periods, constitutes employment compensable under the Act	6
II. Fire duty in a building devoted to the production of goods for commerce is an occupation necessary to such production within the meaning of the Act	19
Conclusion	21
Appendix	22
A. Interpretative Bulletin No. 13	22
B. Letters from Administrator	38
C. Statutory Provisions involved	43

CITATIONS

Cases:

Addison v. *Holly Hill Fruit Products Co.*, 64 S. Ct. 1215	9
Bountiful Brick Co. v. *Giles*, 276 U. S. 154	15
Chicago & A. R. R. Co. v. *Bragonier*, 119 Ill. 51	8
Fleming v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005	15
Johnson v. *Durks Lumber & Coal Co.*, 130 F. (2d) 115	16, 17, 19
Kirschbaum Co. v. *Walling*, 316 U. S. 517	5, 15, 19,
McCulloch v. *Maryland*, 4 Wheat. 316	20
Minneapolis & St. L. R. R. Co. v. *United States*, 245 Fed. 60, certiorari denied, 245 U. S. 666	15
Missouri, K. & T. R. R. Co. v. *United States*, 231 U. S. 112	14, 15
Muldowney v. *Seaberg Elevator Co.*, 39 F. Supp. 275	17
Phelps Dodge Corp. v. *Labor Board*, 313 U. S. 177	9, 14
Reck v. *Zarnowy*, 33 N. Y. S. (2d) 582	18
San Pedro, L. A. & S. L. R. R. Co. v. *United States*, 213 Fed. 326	15
State v. *Rose*, 125 La. 462	8
Strand v. *Garden Valley Telephone Co.*, 51 F. Supp. 898	17
Super-Cold Southwest Co. v. *McBride*, 124 F. (2d) 90	8
Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local*, 321 U. S. 590	7, 8, 15, 17, 18

63182°—44——1

Cases—Continued. Page

Travis v. *Ray*, 41 F. Supp. 6 ..... 15, 17
United States v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783 15
United States v. *Denver & R. G. R. R. Co.*, 197 Fed. 629 15
United States v. *Illinois Cent. R. R. Co.*, 180 Fed. 630 15
United States v. *Southern Pac. Co.*, 245 Fed. 722 15
Walling v. *Allied Messenger Service, Inc.*, 47 F. Supp. 773 ..... 16, 17
Walling v. *Dunbar Transfer & Storage Co.*, 6 Wage Hour Rept. 476 18
Walling v. *Sun Pub. Co.*, 47 F. Supp. 180 18
Walton v. *Southern Package Corp.*, 320 U. S. 540 ..... 5, 15, 19
Whitsitt v. *Enid Ice & Fuel Co.*, 5 Wage Hour Rept. 636 13

Federal Statute:

Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 (Fair Labor Standards Act):

Sec. 3 (a) 14
Sec. 3 (b) 14
Sec. 3 (c) 14
Sec. 3 (d) 14, 43
Sec. 3 (e) 14, 43
Sec. 3 (f) 14
Sec. 3 (g) 14, 43
Sec. 3 (h) 14
Sec. 3 (i) 14
Sec. 3 (j) 14, 43
Sec. 3 (k) 14
Sec. 3 (l) 14
Sec. 3 (m) 14
Sec. 7 (a) 3, 43

Miscellaneous:

Webster's New International Dictionary, 2d ed., unabridged 8
Interpretative Bulletin No. 13, issued by the Wage and Hour Division, United States Department of Labor 8, 10, 11, 12, 14, 22

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour

Division, United States Department of Labor, as *amicus curiae*.

OPINIONS BELOW

No. 12

The opinion of the District Court for the Northern District of Texas (R. 26–29), rejecting the petitioners' claim, is unreported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 62–64), affirming the District Court, is reported in 136 F. (2d) 112.

No. 73

The opinion of the District Court for the Northern District of Illinois (R. 7, 29), rendering a judgment in favor of the plaintiffs, is not officially reported, but is printed in 6 Lab. Cases 61,313. The opinion of the Court of Appeals for the Seventh Circuit (R. 42), affirming the District Court, is reported in 140 F. (2d) 356.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals in case No. 12 was entered on June 1, 1943 (R. 64). The petition for writ of certiorari was filed August 2, 1943. The petition was denied on October 11, 1943 (320 U. S. 763, 812), but the order denying certiorari was vacated and certiorari was granted on May 29, 1944 (64 S. Ct. 1256).

The judgment of the Seventh Circuit Court of Appeals in case No. 73 was entered on February

5, 1944 (R. 46). The petition for certiorari was filed on May 2, 1944 and granted on May 29, 1944 (R. 55; 64 S. Ct. 1265).

The jurisdiction of this Court in both cases rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The main question involved in both cases is: Whether all or any part of the time employees are required to remain on the employer's premises on call for fire duty constitutes employment for which compensation must be paid under the Fair Labor Standards Act.

In case No. 73, the further question is presented, whether such fire duty is an "occupation necessary to the production" of goods for commerce within the coverage of the Act.

STATUTE INVOLVED

The sections of the statute primarily involved are Sections 3 (d), 3 (e), 3 (g), 3 (j), and 7 (a). These sections appear in the Appendix, *infra*, pages 43–44.

STATEMENT

Both suits were instituted by employees under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation allegedly required by Section 7. In each case, the employees were required to perform fire duty several evenings and nights a week in addition to their

regular day time work. This duty involved remaining on or near the employers' premises from twelve to fifteen hours after the regular working day, subject to call in case of a fire alarm. In neither case did the employees live on the company's premises; they slept there only on the nights they were on duty. In both cases sleeping accommodations and recreational facilities were furnished by the employer in the fire hall building, and the employees spent their time, when not answering emergency alarms, reading, talking, playing games, listening to the radio or sleeping. The detailed facts in each case are adequately stated in the briefs of the parties.

The District Court in the *Skidmore* case ruled that although the employees "for their allotted time at the fire hall * * * were required to be there," and although being there "was their duty as much as performing their regular work" (R. 27), nevertheless "pursuing such pleasurable occupations or performing such personal chores, does not constitute work." *Ibid.* The Fifth Circuit affirmed, reasoning that "The Act does not require payment of wages to an employee merely because he is away from home," nor does it "undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed." It ruled that "Certainly plaintiffs are not entitled to recover overtime compensation for sleeping," and since their proof

failed to segregate sleeping from non-sleeping and playing time, the judgment against them would stand: "Even if the plaintiffs had been entitled to recover for hours spent in boredom, or waiting for bedtime or an alarm * * *" (R. 64).

In the *Armour* case, the District Court ruled that the employees were entitled to compensation for all the time "on call" except the time regularly spent in sleeping or in eating meals. The court said that for the remainder of the time the employee "has not freedom to do whatever he may desire, he may not be with his family, or attend a theatre or other place of amusement. He is serving his employer" (R. 7). The parties stipulated that seven hours were regularly spent in sleeping and one and one-half hours in eating (R. 27), and the court ruled that this eight and one-half hours should not be included as working or employment time. The District Court also ruled that fire duty is an occupation just as necessary to production of goods for commerce within the meaning of the Act as are "watchmen employed to protect the building in which production is carried on from theft and fire" (R. 29–30).

The Seventh Circuit affirmed. On the question of the coverage of the Act, the court said that "an auxiliary fireman is not unlike a night watchman," and therefore the decisions in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, were controlling (R. 43).

On the question of working or employment time, the court said that the *Skidmore* decision of the Fifth Circuit was distinguishable on the facts, in that there was an agreement in that case to pay special separate compensation in case the employee received a fire call. The court stated, however, that it was "not certain that such distinction would or should materially affect the conclusion" (R. 44). It expressed the opinion that "notwithstanding the latitude they [the employees] had in their activities, * * * their legal status was that of employee during that time," that such employment was not among the activities expressly exempted from Section 7, and that therefore the court should not read such an exemption into the Act (R. 44–45). With respect to the exclusion of sleeping and eating periods from the computation of the working time, the Court of Appeals said that it did not have before it the correctness of this ruling, since no appeal had been taken from that part of the judgment.

ARGUMENT

I

THE TIME SPENT BY EMPLOYEES ON DUTY AS AUXILIARY FIREMEN, EXCEPT FOR THE REGULAR EATING AND SLEEPING PERIODS, CONSTITUTES EMPLOYMENT COMPENSABLE UNDER THE ACT

The result reached in the *Armour* case by the courts below is in accord with the Administrator's interpretation, while the decisions below in the

Skidmore case are contrary to the Administrator's views. This Court pointed out in *Tennessee Coal Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 597, that there is not "any precise statutory definition of work or employment" to guide the determination in particular situations of this character.[1] But under the principles announced by this Court in the *Tennessee Coal* case, *supra*, the interpretation which treats the "on call" duty, except for the regular sleeping and eating periods, as compensable time, seems the correct one. This interpretation, it is believed, not only construes the words "work" and "employment" in the sense in which "those words are commonly used" (*Tennessee Coal* decision, 321 U. S., at 598), but also adopts "a realistic attitude" with due regard to the "remedial and humanitarian" purpose of the Act. (*Id.*, at 592, 597).

While admittedly the fire duty in question does not impose burdensome labor upon the employees, it unquestionably claims their time and liberty, and "is required by the employer and is pursued necessarily and primarily for his benefit and business." *Tennessee Coal* case, 321 U. S., at 598. Under the ordinary meaning and the dictionary definitions of the words "work" and "employ," the duty involved here constitutes employment.

[1] "It is perhaps true," as the Seventh Circuit said, "that Congress did not visualize a case of this kind when the Act was passed." (R. 45.)

The Armour and Swift companies, in requiring such duty of employees, "make use of the services of" and "give employment to" them and "entrust [them] with some duty or behest."[2] The contention that the companies are furnishing the employees with "recreation" rather than employment (see Armour and Company's brief in support of petition, p. 17), is spurious. And the statement of the Fifth Circuit that "'working' is not synonymous with 'availability for work'" ignores the time and service the employee is contributing while on fire duty and the restraint imposed upon his liberty. This is not a case where the employee "merely had to leave his telephone number or place where he could be found." Compare *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90, 92 (C. C. A. 5). Nor, as the trial court in the *Armour* case observed, is the situation "the same as that of one living on the premises of the

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[2] See *Tennessee Coal & Iron* case, *supra*, 321 U. S., at 598, footnote 11, quoting the definitions of "employ" from Webster's New International Dictionary (2nd ed., unabridged). The term "work" has been defined to include "employment," "task," "duty." See Webster's International Dictionary (2nd ed.); *State* v. *Rose*, 125 La. 462, 466, 51 So. 496, 497 (1910); *Chicago & A. R. R. Co.* v. *Bragonier*, 119 Ill. 51, 63, 7 N. E. 688, 693 (1886).

See Interpretative Bulletin 13, par. 8, Appendix, *infra*, p. 27, where the Administrator has stated that if "* * * the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to **any particular place, such time need not ordinarily be considered hours worked.**"

employer and subject to call but generally free to go or come as he pleases" (R. 7). The employees here, on the evenings and nights when they are on fire hall duty, are tied down within the confines of the employers' premises from 12 to 15 hours in addition to the regular day's work. While the Administrator is of the opinion that a practical construction of "employment" in accordance with common understanding might justify excluding from the computation of compensable time uninterrupted eating and sleeping periods, neither the statutory language nor the need for a common sense application of the Act warrants the extreme view advanced by the employers here and adopted by the courts below in the *Skidmore* case.

The Administrator, in the early months after the enactment of the Fair Labor Standards Act, received many inquiries with respect to the applicability of the Act to periods of inactivity or illness due to the nature of the employment. The problems thus presented appeared to require a practical flexible interpretation, which would be most consistent with the ordinary meaning of "work" or "employment," rather than a rigid "either-or rule," which would either entirely include or entirely exclude all inactive duty.[1] An effort to provide such a practical guide

[1] See *Addison v. Holly Hill Fruit Products Co.*, 64 S. Ct. 1215, 1223; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 198.

was made in an interpretative bulletin issued by the Administrator in May of 1939.[1] Paragraphs 4 through 8 of the bulletin were devoted to questions relating to "waiting time and employees subject to call." The precise problem of auxiliary firemen's duty was not explicitly dealt with, but specific answers were given by the bulletin with respect to two types of related problems: (1) the situation where the employee, although he is required to live on the employer's premises or to be on call at his own home, regularly has both a normal night's sleep and freedom to conduct his personal affairs and to carry on a normal routine of living; and (2) the situation where the employee has periods of inactivity for varying lengths of time between intermittent periods of active duties, and must remain conveniently available during the inactive periods to be ready to perform the active duties when called upon. Examples of the first type given in the bulletin are: a pumper of a stripper well who must be on hand at all times to start the pump up when it stops (at any time during the day or

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[1] Interpretative Bulletin No. 13. This was released to the press on May 3, 1939 (Wage and Hour Division Release Files, R 272), and was issued in printed form in July 1939. The bulletin was subsequently revised in respects not relevant here. The paragraphs pertinent here, that is, those relating to waiting time and time on call, have remained unchanged since the date the bulletin was originally issued. A copy of the most recent issue of the bulletin is printed in the Appendix, pp. 22–38.

night), custodians or watchmen living at lumber camps during the off season, a telephone operator of a small exchange operating a switchboard located in the employee's house (Bulletin 13, pars. 6 and 7). Examples of the second type are: messenger boys who sit around in the office and wait for messages to be routed out, a chauffeur who must hold himself in readiness to drive company officials to and from appointments, employees waiting for materials to be furnished or waiting for the loading or unloading of railroad cars, employees required to remain on the employer's premises after regular working hours to furnish emergency service to customers when called upon (Bulletin 13, pars. 4, 5, 8).

In cases of the first type, the bulletin states that "a reasonable computation of working hours" which segregates and excludes "several hours of uninterrupted sleep every night" seems justified and is acceptable to the Wage and Hour Division for administrative purposes (pars. 6 and 7). In situations of the second type the bulletin states that the employee's "time is not his own while he remains conveniently available to carry out the instructions of his employer", and therefore the time so spent should be considered working time (pars. 4, 5, and 8).

For the situations which do not fall clearly within one or the other of these two types the bulletin offers no specific answer, but states that the answer "will depend generally upon the de-

gree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work" (par. 6). The opinion is expressed that where an employee is subject to call after the completion of his regular working day, the time should be considered compensable if he "is required to remain in or about the place of business of the company," but need not ordinarily be considered compensable "if the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place" (par. 8).

It will be seen that the problem in the instant cases falls in the general class for which no definite answer is offered. The employees here do not perform their fire duty at their own residences; they are required to remain on the company's premises, and consequently they do not have the freedom to engage in "entirely private pursuits" and "to carry on a normal routine of living." On the other hand, the employees here, with rare exceptions, were able to secure several consecutive hours of uninterrupted sleep and time in which to eat their meals—purely private pursuits which presumably would occupy their time whether or not they were on duty, and pursuits which are not substantially circumscribed by the

demands of the duty. It is true, as the petitioners in the *Skidmore* case point out, that even during such eating and sleeping periods, the employees nonetheless render an important service to the employer, and their freedom is restricted to the extent that they and their families are deprived of the comfort and companionship of being together. Therefore, the contention that all of such time should be held compensable is not without substance.[5] However, the Administrator has concluded that under the principles expressed in his bulletin, the more reasonable view was that the usually uninterrupted eating and sleeping periods might be excluded but that the remainder of the time on duty including, of course, all time actually spent in answering alarms should be treated as part of the hours of work or employment for purposes of the Act.[6] The Administrator has consistently expressed this view in answer to all inquiries regarding auxiliary fire duty, and he has been advised that several employers have put this interpretation into practice.

The reasoning of the trial and appellate courts in the *Skidmore* case, that only hours spent in active work or exertion, or "hours of toil" (R. 63), are compensable under the Act, is contrary to

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[5] In support of this position, see *Whitsitt* v. *Enid Ice & Fuel Co.*, 5 Wage Hour Rept. 636 (W. D. Okla. 1942).

[6] See, for example, the letters printed in the Appendix, pp. 38–42, with respect to the proposed practices of the Silas Mason Company and Sears Roebuck and Company.

both the language and the spirit of the Act and finds no support in the authorities interpreting this and analogous employment statutes.[*] The Administrator's construction that hours of employment "are not limited to the time spent in active labor, but include time given by the employee to the employer even though part of the time may be spent in idleness" (Interpretative Bulletin No. 13, par. 4), is amply supported by the decisions of this Court. In *Missouri, K. & T. R. R. Co.* v. *United States*, 231 U. S. 112, this Court held that time spent "waiting, doing nothing" while the engine was sent off for water and repairs, should be included in determining whether the employees had been on continuous duty in violation of the provisions of the Hours of Service

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[*] Similarly, the contention of the petitioner in the *Aymour* case (see petitioner's brief, pp. 25-26) that the word "employ" means only and literally to suffer or permit to *work* is untenable. The application of the Act does not in terms depend upon the performance of physical or active work. The word "employ" even more than the word "work," characterizes the scope of the Act. Section 3 (g) does not say that "employ" *means* to suffer or permit to work; it says that "'employ' includes to suffer or permit to work." Thus it appears that the definition was designed to broaden, not to narrow, the meaning of the word "employment." See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 188-189. Compare the definitions of "person," "commerce," "state," "industry," "goods," "produced," "oppressive child labor," where the word "means" is used (Sec. 3) (a), (b), (c), (h), (i), (j), (l), with the definitions of "employer," "employee," "agriculture," "employ," "sale," and "wage," where the word "includes" is used (Sec. 3) (d), (e), (f), (g), (k), (m)).

Act. Mr. Justice Holmes, speaking for the Court, pointed out that the employees "were under orders, liable to be called upon at any moment, and not at liberty to go away." He held that they were "nonetheless on duty when inactive. Their duty was to stand and wait" (231 U. S., at 149).[2]

Although the employment involved in the case of *Tennessee Coal Iron & R. R. Co.* v. *Muscoda Local* was "hard labor," this Court recognized that inactive duties also constitute employment within the scope of the Act. The Court explicitly noted that "employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act" (321 U. S., at 399), and cited the cases of *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005 (N. D. Ga.); *Travis* v. *Ray*, 41

[2] To the same effect see *United States* v. *Southern Pac. Co.*, 245 Fed. 722 (C. C. A. 9); *Minneapolis & St. L. R. R. Co.* v. *United States*, 245 Fed. 60 (C. C. A. 8), certiorari denied, 245 U. S. 666; *San Pedro, L. A. & S. L. R. R. Co.* v. *United States*, 213 Fed. 326, 329 (C. C. A. 8); *United States* v. *Denver & R. G. R. R. Co.*, 197 Fed. 629 (D. N. Mex.); *United States* v. *Illinois Cent. R. R. Co.*, 180 Fed. 630 (N. D. Iowa), and *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783 (W. D. Wash.). See also *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158.

F. Supp. 6 (W. D. Ky.); *Walling* v. *Allied Messenger Service, Inc.*, 47 F. Supp. 773 (S. D. N. Y.).

It is common knowledge that a night watchman spends many of the hours he is on duty in idleness during the intervals between his rounds. Yet the courts, which have uniformly held watchmen's duties to be within the scope of the Act, have not distinguished between this kind of inactivity and the more active duties. The Eighth Circuit, in fact, has emphatically ruled that an agreement to pay employees only for their active manual labor and not for the additional time they are "required to remain at their places of duty as caretakers and watchmen" is invalid. *Johnson* v. *Dierks Lbr. & Coal Co.*, 130 F. (2d) 115 (C. C. A. 8). The facts of that case were strikingly similar to the situations in the instant cases. The plaintiffs were employed to grease and service trucks and tractors and to perform other manual labor, and, in addition, to act as watchmen to prevent vandalism at the lumber camps. They were required to sign an agreement stating that their working hours did not exceed more than six hours a day. This in fact was an agreement to pay the employees only for the hours devoted to manual labor. The Eighth Circuit held that such an agreement "frustrated" the purposes of the Act, and that the employees were entitled to compensation for their duties as caretakers and watch-

men, as well as for their manual labor. 130 F. (2d) at 119–120."

In the case of *Walling* v. *Allied Messenger Service, Inc., supra*, which this Court cited in the *Tennessee Coal* opinion, a considerable amount of time spent each day by messengers merely waiting in the employer's office for calls was held to be compensable employment. 47 F. Supp., at 778, 779. And in *Travis* v. *Ray, supra*, waiting periods of from one to three hours spent by bus drivers between runs, including three hours at night spent "trying to get some sleep in the bus," were held to

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[10] The majority opinion in the *Johnson* case made no explicit ruling on sleeping time. In a concurring opinion, however, Judge Stone said that "in the factual situation shown in this present record," where it appeared that the employees slept "an average of eight or nine hours a night," the sleeping hours should be excluded from employment hours. 130 F. (2d) at 121. Judge Stone said, however, that he did "not mean that in every case nor under all circumstances, sleeping hours should be excluded"; it "must depend upon the factual situation of each case." (*Ibid.*) See *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898, 902 (D. Minn.), holding that where a night switchboard operator could rest or doze, but was not able "to enjoy 'several hours of uninterrupted sleep' or sleep for any substantial period," the sleeping time must be regarded as employment time under the Act. Cf. *Muldowney* v. *Searing Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.), where the court held that an employee, who was required to sleep every night on the company's premises, was not entitled to recover for time consumed in "a normal night's sleep," in eating meals, and in entirely private pursuits, such as dressing and shaving.

be hours of employment within the coverage of the Act." The Court reasoned that the driver "had to hold himself available and be ready for duty," and "being on duty subject to call if one's service should be required, is as much employment in the legal sense of the term as actual labor." 41 F. Supp., at 9. As this Court said in the *Tennessee Coal* case, the Act "must not be interpreted or applied in a narrow grudging manner" but must be viewed as "necessarily indicative of a Congressional intention to guarantee * * * compensation for all actual work or employment."

" See also *Walling* v. *Dunbar Transfer & Storage, Inc.*, 6 Wage Hour Rep. 476 (W. D. Tenn. 1942), holding that the hours for which the drivers and helpers employed by a property motor carrier must be compensated "include not only the hours that employees were actually engaged in specific assignments," but also "the time spent in waiting about the premises for an assignment, as well as time spent in traveling from defendant's place of business to freight terminals and waiting for an opportunity to load defendant's trucks"; *Walling* v. *Sun Pub. Co.*, 47 F. Supp. 180, 191 (W. D. Tenn.), affirmed 140 F. (2d) 445 (C. C. A. 6), certiorari denied 64 S. Ct. 946, holding that radio engineers are entitled to compensation, when they are on duty during broadcasts, for periods of inactivity between the half hour meter readings "as they were obliged to remain on or near the premises to enable them to carry out the tasks for which they were responsible" (Conclusions of Law 9); *Beck* v. *Zarnoch*, 33 N. Y. S. (2d) 582 (Sup. Ct. N. Y., N. Y. Co., 1941), holding that periods of inactivity characteristic of plaintiff's job as general assistant to a band leader during the making of recordings and radio broadcasts were compensable employment "since he was required to be present ready to work during all the time involved."

321 U. S., at 597–598. The Act was not designed to perpetuate practices or agreements which "allow an employer to claim all of an employee's time while compensating him for only part of it." (*Ibid.*) See also *Johnson* v. *Dierks Lumber & Coal Co.*, *supra*, 130 F. (2d) at 120.

II

FIRE DUTY IN A BUILDING DEVOTED TO THE PRODUCTION OF GOODS FOR COMMERCE IS AN OCCUPATION NECESSARY TO SUCH PRODUCTION WITHIN THE MEANING OF THE ACT

The Seventh Circuit correctly ruled that "an auxiliary fireman is not unlike a night watchman," and that therefore this Court's decisions in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, are controlling on the coverage question (R. 43). In the *Kirschbaum* case, this Court described the duties of the watchman as protecting "the buildings from fire and theft" (316 U. S., at 519), and in the *Walton* case it was pointed out that the watchmen's duty was to "report any fires and trespassers" (320 U. S., at 542). The duty to be on hand to put out fires when they occur is no less necessary to the protection of the building than the duty of watching for and reporting fires and theft.

Petitioner Armour's contention that the auxiliary fireman's duty was not indispensable but

simply for the purpose of reducing insurance costs (brief p. 22–24) was explicitly answered by this Court in the *Walton* case. In that case also it was argued that the primary reason why a night watchman was employed was to secure reduced fire insurance premium rates. This fact, said the Court, did not indicate that the watchman was not necessary for the production of goods for commerce, but on the contrary. "The very fact that a fire insurance company was willing to reduce its premium upon conditions that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to 'the continuous production of respondent's goods'" (320 U. S., at 542).

Even if it be assumed that auxiliary firemen were not "indispensable" to the protection of the building in the instant case (see Armour and Company's brief pp. 19, 21–23) it would not follow that such employment was outside the scope of the Act. As the District Court in the *Armour* case pointed out (R. 30), this Court long ago ruled that the word "necessary does not always 'import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without the other' but that 'it frequently imports no more than that one thing is convenient, or useful, or essential to another.'" *McCulloch* v. *Maryland*, 4 Wheat. 316, 413.

CONCLUSION

It is respectfully submitted that the judgment of the Fifth Circuit in No. 42 should be reversed, and the judgment of the Seventh Circuit in No. 73 should be affirmed.

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OCTOBER 1944.

APPENDIX

A

INTERPRETATIVE BULLETIN NO. 13

HOURS WORKED—DETERMINATION OF HOURS FOR WHICH EMPLOYEES ARE ENTITLED TO COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT OF 1938

First issued July 1939. First revision (par. 15) October 1939. Second revision (par. 15) October 1940. Revised November 1940. United States Department of Labor, Wage and Hour Division, Office of the Administrator.

GENERAL

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of sections 6 and 7 of the act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the act, unless he is directed otherwise by the authoritative rulings of the courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin No. 4 is not within the scope of this bulletin.

2. The act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.[1] The following specific problems with respect to the determination of hours worked which have been presented for our consideration are not sufficiently answered by this formula, however, and more detailed discussions of these problems are, therefore, set out in the following paragraphs.

TIME CLOCKS

3. Neither the statute nor Regulations, Part 516 (Requirements for Keeping Records), require that time clocks be used or specify the manner in which an employer has to keep a record of the number of hours worked by his employees. Time

[1] No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.

clocks where used will be an appropriate basis for recording hours worked only when they accurately reflect the period worked by the employee. Whether or not time clocks accurately reflect the period worked by the employee is to be determined by the formula in the preceding paragraph. It should be noted also that if the employer requires the employees to punch a time clock and the employee is required to be present for a considerable period of time before doing so, such time will be considered hours worked.

WAITING TIME AND EMPLOYEES SUBJECT TO CALL

4. Many inquiries have been received with respect to periods of inactivity due to the breakdown of machinery and time spent in waiting for materials to be furnished or waiting for the loading or unloading of railroad cars or other vehicles of transportation. Generally, the time during which an employee is inactive by reason of interruptions in his work beyond his control should be included in computing hours worked either if the imminence of the resumption of work requires the employee's presence at the place of employment *or* if the interval is too brief to be utilized effectively in the employee's own interest. This result would not be affected by the fact that the employer tells his employees that they are free to leave the premises. Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer even though part of the time may be spent in idleness.

5. Many inquiries have likewise been received regarding employments, the very nature of which

involve periods of inactivity for varying lengths of time. Ordinarily such periods of inactivity during which employees are on duty should be considered hours worked. Thus, for example, messenger boys who sit around in the office and wait for messages to be routed out should be considered as working not only when they are actually delivering messages but also while waiting for such messages to be assigned. Similarly, a chauffeur who is required to drive officials of a company engaged in the production of goods for commerce should be considered as working not only when he is actually driving such officials but also during the time he is obliged to hold himself in readiness to drive. In these cases the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer.

6. In a few occupations periods of inactivity need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work—i. e., the frequency with which the employee is called upon to engage in work. In these cases, the nature of the employee's work involves long periods of inactivity which the employee may use for uninterrupted sleep, to conduct personal business affairs, to carry on a normal routine of living, etc. A good example of this is the employee of a small

telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experienced over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a segregation of such hours from hours worked will probably be justified.

7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which

to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division.

8. In some cases employees may be subject to call after the completion of their regular working day; employees may be called upon after regular working hours to furnish emergency service to customers. If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered hours worked. If, on the other hand, the employee is merely required to leave word where he can be reached in the event of a call and is not tied down to any particular place, such time need not ordinarily be considered hours worked. The employee, however, should be considered as working at any time during which he is actually making a call and his hours worked would include all time traveling to and from such a call.

TRAVEL TIME

9. The problem of travel time, in relation to hours worked, arises in a great variety of situations and no precise mathematical formula will provide the answer in every case. The question is often one of degree; if the time spent by an employee in traveling is reasonably to be described as "all in a day's work," such time should be considered hours worked under the act.

10. As a general rule it may be stated that an employer should treat time spent by an employee during regular working hours in traveling pursuant to the employer's instructions as hours worked. If an employer requests his employee to do a job during regular working hours which require the employee to leave the place of business, the traveling time of the employee should be included in hours worked, and this is true whether or not the particular job is within the employee's regular duties.

11. In many cases travel time outside of regular working hours is considered "part of the day's work" and, accordingly, should be treated as hours worked. Thus, an employee whose normal working day extends from 8 a. m. to 5 p. m. may be requested by his employer at 5 p. m. to make one more outside call which involves 2 hours of traveling time (to get to the place where the work is to be performed and report back to the office) and active labor of 1 hour. In such case the employer may not disregard the travel time in computing the number of hours worked by the particular employee; the employee's working day would extend from 8 a. m. to 8 p. m. In this case the employee engages in active labor for his employer after the close of his regular working day and prior to the commencement of his next regular working day, and his activities between 5 p. m. and 8 p. m. are, under the circumstances, reasonably to be considered as a continuation or extension of his normal working day. The same results, of course, would be reached if the employer requested his employee to report for work

2 hours earlier in the morning in order to make the one extra call.

12. If a crew of workers is required to report for work at a designated place at a specified hour and all the employees are then driven to the place where they are to perform work, the time spent in riding to such place should be considered hours worked. Similarly, the time spent returning from the place at the close of the day's work should be considered hours worked. In some cases, however, the employer requests his employees to report for work at a specified hour at the place where the work is to be performed instead of at the employer's place of business. In these cases the employee's working time may be considered to begin at the time he reports for work, unless the traveling time required in order to reach the place where the productive work is to be performed is unreasonably disproportionate to the normal traveling time required in reporting for work at the headquarters of the employer. No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and reasonable standards agreed upon between the employer and employee will be accepted for purposes of the act.

13. In some cases an employee is required to travel continuously for more than a full working day during which time the employee is not engaged in actual productive work for his employer. For example, an employee whose regular working hours extend from 8 a. m. to 5 p. m. may be required to spend 2 or 3 days and nights of continuous travel to reach a place where he is to per-

form assigned work. In such case, as indicated generally in paragraph 10, time spent traveling during the regular working hours should be considered hours worked. Travel time outside of regular working hours need not ordinarily be considered hours worked. If, however, the employee is required to travel on Saturdays, Sundays, and holidays, he should be considered as working on those days for the number of traveling hours between his established starting and stopping time on other days of the week. In determining whether the foregoing is applicable, factors such as the length of time required to reach the place where the assigned work is to be performed, whether the employee is given adequate time for sleeping and relaxation, the time that the employee is required to report for actual productive labor, etc., are very important.

14. Inquiries have been received with respect to employees who are required to travel continuously for several days and who perform active labor while traveling. Thus, for example, when cattle or poultry, etc., are sent to market by rail, an employee of the shipper is required to travel on the train in order to water and feed the stock en route. In other cases an employer who ships machinery by train to a distant customer requires an employee to oil the machinery en route and otherwise to see that it arrives in perfect condition. The employee generally rides in the caboose with the train crew. In each of the foregoing cases, the employees are subject to call for 24 hours a day, but time required for active work by such employees would ordinarily be much less. The em-

ployee generally has a substantial amount of time for sleeping, eating, relaxation, etc.[2] No precise formula will decide this type of case and any reasonable agreement entered into between the parties or established by custom and usage which takes into account the amount of time required for active labor by the employee and the fact that the employee is subject to call for 24 hours a day, will be respected by this Division in its enforcement policy.

MEETINGS, LECTURES, AND TRAINING PROGRAMS

I. *General*

15. If the following four criteria are met, the time spent in attending meetings and lectures need not be considered hours worked: (1) Attendance on the part of the employee is in fact voluntary (attendance will not be considered voluntary if a condition of the employee's continued employment in his present job is attendance at the meeting or lecture); (2) the employee does not produce any goods or perform any other productive work during such meeting or lecture; (3) the meeting or lecture is given outside of regular working hours; and (4) the meeting or lecture is not directly related to the employee's work. (With respect to this last criterion, a meeting or lecture will not generally be considered directly related to the employee's work unless such meeting or lecture may

[2] The question is obviously one of degree. No opinion is expressed in the case of the relief truck driver. As to the exemption provided by sec. 13 (b) (1) from the hours provision of the act, see Interpretative Bulletin No. 9.

reasonably be considered part of his job. Obviously, attendance at a picnic or to participate in an athletic contest would not be considered directly related to the employee's work. On the other hand, meetings and lectures for the purpose of teaching the employee mine rescue or fire prevention and control do seem directly related to the employee's work.)

II. *Specific situations*

The following is a discussion of the applicability of these general criteria to specific situations:

A. *Industrial Training Programs.*—With respect to industrial training programs, it is our opinion that time spent in attendance at industrial training courses need not be considered hours worked if (1) attendance on the part of the employee is in fact voluntary; (2) the employee does not produce any goods or perform any other productive work during such periods of training; (3) the training course is given outside of regular working hours; and (4) the training course is not intended to train the employee to a new, different, or additional skill, and is not intended to make the employee more efficient at doing what he has been doing in his present job. The last condition (4) is not a departure from the general criterion mentioned in the preceding paragraph that the meeting or lecture must not be directly related to the employee's work. Rather this condition is merely intended to indicate specifically how that criterion operates with respect to industrial training programs. In other words, in the case of industrial training programs, the programs will not be

considered directly related to the employee's work if the training course trains the employee to a new, different, or additional skill.

A few examples will serve to show the distinction between those industrial training programs attendance at which will be deemed hours worked and those programs attendance at which will *not* be deemed hours worked:

(1) One example is that of a welder who is working in an automobile plant welding steel automobile frames. The employer has accepted an order for airplane fuselages, in the construction of which employees having the skill to weld aluminum will be required. The employer gives to any welder in his organization the opportunity, if he chooses, to take a course after working hours in welding aluminum. In such course no finished product is made, but the end product of the welding is scrapped. There is provision that if the welder does not acquire this higher skill he shall be permitted to continue to be a welder working for the employer on steel automobile frames.

(2) Another example is that of a typist. An expansion of the plant gives opportunity for stenographers. The employer offers to any of his typists who choose an opportunity after work to be trained for stenographic work. Such training is not made a condition of their continuing as typists and no regular office work is done for the employer during the training period.

(3) Another example is the case of a punch-press operator who knows that his employer will install drop forging machines, employment in the operation of which will yield a higher rate of pay.

The employer offers a certain number of punch press operators and employees in other skills an opportunity after work to be trained on drop forging machines. The end product of the forging is scrapped. Punch-press operators who do not take this course are allowed to continue in employment as punch-press operators.

(4) Finally, an example of a case in which attendance at the training course must be considered hours worked is that of a sewing-machine operator in a garment factory whose productivity is such that it is marginal in comparison with the median productivity of all the other sewing machine operators. The employer says, "you are too slow and unless you practice on waste material after work and get up your productivity and speed, you cannot work here any more." This would be hours worked for two reasons: (1) Attendance would not be voluntary, and (2) the employee would not be learning a new, additional, or different skill.

These examples point out the underlying purpose of the four conditions which must be met if attendance at the training course is not to be considered hours worked. Such purpose is to prevent exploitation of labor in violation of the act by using alleged training programs to effect a stretch-out or speed-up in the work of employees in their present position. The program to satisfy the four criteria must essentially be for the purpose of providing better employment by adding skills primarily for the benefit of the employee, although, of course, the program would also benefit the employer by providing him with certain skills in which his labor market is deficient.

B. *Attendance at public schools, recognized universities or other bona fide institutions of learning.*—In some cases employees attend public schools or take regular courses in a recognized university or other bona fide institution of learning. The courses given are part of a standard curriculum and are not designed to accommodate the requirements of any particular plant. Thus, for example, a teller in a bank may take a university course on the financial policy of corporations, or a mechanic in a factory may take a course in draftsmanship or physics. In these cases the subject matter of the course impinges on the general subject matter of the employee's job and makes him more versatile and better qualified to assume additional responsibility. The instruction, however, has no necessary and immediate relation to the particular work done by the employee and he does not, of course, engage in any productive work for the employer during time spent taking the course. In our opinion, time spent by an employee outside regular working hours in attending lectures at, or in studying correspondence courses given by, a public school, or university, or other bona fide institution of learning (even if the employer pays the necessary tuition) will not be considered "directly related to the employee's work" and, if attendance is voluntary, need not be considered hours worked.

C. *Safety meetings.*—Safety meetings which take place outside working hours and are conducted, sponsored, or otherwise approved by a governmental agency (state or federal) or by any recognized independent or other bona fide organization engaged primarily in disseminating safety

information, will not be considered "directly related to the employee's work." Furthermore, even if the safety meeting is not so conducted, sponsored, or approved, it will not be considered "directly related to the employee's work" if it is conducted outside working hours as part of a general safety program which is not restricted to the hazards of the job at hand or to the personal responsibilities of employees in doing their job safely and efficiently. Accordingly, voluntary attendance at such meetings need not be considered hours worked.

III. *Apprenticeship training.*

In view of the special circumstances involved in bona fide apprenticeship training, it is our opinion that time spent in related supplemental instruction by a bona fide apprentice—one who is employed under a written apprenticeship agreement which meets the standards of the Federal Committee on Apprenticeships or which conforms substantially with such standards—need not be considered hours worked if the written apprenticeship agreement so provides. Bona fide apprenticeship programs involve consideration of public policy not present in the case of the ordinary employer-employee relationship. They are intended to provide the community with an adequate number of journeymen who have had a combination of practical experience and theoretical instruction and thus to enhance employability. The comprehensive program of practical training covering an entire trade is supplemented by theoretical instruction designed to give the apprentice a better understanding of the mechanical activities which he will be called upon to perform

in his trade. It should be noted, however, that related supplemental instruction does not include time spent by an apprentice in performing his regular duties or in any active work. Such time should be considered hours worked under all circumstances.

Employees Having More Than One Job

16. Many inquiries have been received with respect to employees who work for two or more companies. Thus, for example, company A and company B may arrange to employ a common watchman, the employee having the duty of watching the property of both companies concurrently for a specified number of hours each night. In this case A and B are not each required to pay the minimum rate required under the statute for all hours worked by the watchman (i. e., 30 cents an hour each) but A and B should be considered as a joint employer for purposes of the act.

17. In some cases, however, an employee may work 40 hours for company A and 15 additional hours during the same week on a different job for company B. In this case it would seem that if A and B are acting entirely independently of each other with respect to the employment of the particular employee, both A and B, in ascertaining their obligations under the act, would be privileged to disregard all work performed by the employee for the other company. If, on the other hand, the employment by A is not completely disassociated from the employment by B, the entire employment of the employee for both A and B should be considered as a whole for the purposes of the statute. Whether the employment by A

and B are completely disassociated depends, of course, upon the facts in the particular case. This Division will scrutinize all cases involving more than one employment and, at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.

B

LETTERS FROM ADMINISTRATOR

SOL: HK: MJPJ

OCTOBER 13, 1943.

Lt. Col. WILLIAM J. BRENNAN, Jr.,
Office of the Chief of Ordnance,
War Department, Washington 25, D. C.

DEAR COLONEL BRENNAN: This is in reply to your letter of October 1, 1943, to which were attached letters of September 21 and 28 from Sears, Roebuck and Company, contractor-operator of Lordstown Ordnance Depot, Warren, Ohio.

You state that the contractor has recently assumed operation of this storage and distribution depot which was formerly operated by the Ordnance Department with Civil Service personnel. Certain changes have been proposed as a result of this conversion which include the institution of a two-platoon system for fire fighters. The correspondence which you attached sets forth the following facts:

Each shift of fire fighters on the pay roll works a 24-hour tour of duty and is off duty 24 hours. Under this arrangement each shift is on duty three 24-hour periods in one workweek and four 24-hour periods the following workweek, which makes one short week and one long week in each two-week pay period. Prior to Sears, Roebuck and Company taking over the operation, junior fire fighters, senior fire fighters and one assistant chief were compensated on an annual salary basis. Union firemen were receiving $300 annually for overtime and senior fire fighters were being paid a $306 overtime allowance annually.

The company contends that where employees are engaged in active work only part of the day but because of the nature of the job, they are required to be on call for 24 hours, the Fair Labor Standards Act does not require overtime pay for all hours spent on the premises and the company refers to paragraph 7 of Interpretative Bulletin No. 13. The company has set up the following pay roll procedure worked out with the assistance of the fire chief, which it deems a proper determination of "hours worked" in accordance with paragraph 7 of Interpretative Bulletin No. 13:

	Hours
Tour of duty	24
	Hours
Less time allowed for sleeping	8
Less time allowed for breakfast	½
Less time allowed for lunch	½
Less time allowed for supper	¾
Less time allowed for personal needs	½
Total hours spent on post but off duty	10¼
Total hours actually on duty during each Twenty Four Hour Tour	13¾

The company request approval to consider 13¾ hours during a tour of duty as "hours worked" under the Fair Labor Standards Act.

The correspondence further shows that the employees in question will receive more total compensation for a biweekly pay period than they received as Civil Service employees for a semimonthly pay period. The company further explains their deduction of one-half hour from the 24-hour tour for "personal needs" and states that because the employees make their home on the premises during their tour of duty a certain amount of time must be allowed for shaving, toilet preparations, and bathing. It is pointed out that these personal needs are ordinarily taken care of before the employee reports for work and after he leaves work at night and that since they are performed on the premises while the employee is not working the company deducts 30 minutes for this purpose.

Sleeping and eating facilities are provided in the building which houses the fire fighting equipment. The fire fighters normally get eight hours sleep except in case of an alarm. Should a fire break out while the firemen are sleeping they are to be paid for the time spent answering the alarm, fighting the fire and putting away the equipment. A schedule attached to the company's letter of September 21 discloses that the employee's regular hourly rate of pay for the purposes of overtime compensation is computed on the basis of a 40-hour week (the weekly salary obtained by reducing the annual salary to its equivalent weekly wage is

divided by 40 hours and the result thus obtained is the regular hourly rate). Of course, in the case of an annual salary employee, insofar as the act's requirements are concerned, his regular rate of pay is computed by reducing the annual salary to its equivalent weekly wage and dividing the weekly salary by the number of hours regularly worked in that week, and if no regular number of hours are worked, by the actual number of hours worked in that week. In this connection see paragraphs 10–12, inclusive, in the enclosed copy of Interpretative Bulletin No. 4.

Under the proposed plan the company states that the firemen will be paid for time they are on active duty strictly in accordance with the requirements of the Fair Labor Standards Act and would be paid not less than time and one-half their regular hourly rate of pay for time on active duty in excess of 40 hours per week.

On the basis of the facts that are presented, I wish to advise you that the company's proposed methods of computing hours worked does not appear to be objectionable.

Very truly yours,

WM. R. MCCOMB,
Deputy Administrator.

Enclosure.

AD:JBM:GG
AUGUST 26, 1943.

Lt. Col. WM. J. BRENNAN, Jr.,
Chief, Labor Section, Office of the Chief of Ordnance, War Department, Room 1E-520, Pentagon Building, Washington, D. C.

Re: Silas Mason Company—Louisiana Ordnance Plant—Two-Platoon System for Firemen.

DEAR COLONEL BRENNAN: Consideration has been given to the request submitted by the Silas Mason Company, contractor-operator of the Louisiana Ordnance Plant, for permission to inaugurate a two-platoon system for firemen.

My understanding is that the firemen will be regarded as working for 16 of the 24 hours they are required to remain at the company's establishment, and for such time will be paid eight hours at straight time and eight hours at time and one-half. It is further understood that in the event they are called to active duty during the period reserved for sleep, they will be paid for the extra duty at one and one-half times their regular hourly rates of pay.

The plan is said to be mutually satisfactory to both employees and employer and appears to be unobjectionable. Payment to employees in accordance with the plan would not appear to be violative of the Fair Labor Standards Act.

Very truly yours,

WM. R. MCCOMB,
Deputy Administrator.

C

Statutory Provisions Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) read as follows:

Sec. 3. As used in this Act—

* * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in

commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

U. S. GOVERNMENT PRINTING OFFICE: 1944